

CALIFORNIA LAW REVISION COMMISSION

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June 20, 1995

<i>Date:</i> June 29-30, 1995		<i>Place:</i> San Diego
June 29 (Thursday)	10:00 am – 5:00 pm	Office of San Diego County Bar Association 1333 – 7th Avenue (619) 231-0781
June 30 (Friday)	9:00 am – 4:00 pm	
<p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the “California Law Revision Commission”.</p>		

FINAL AGENDA (CORRECTED)

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

Thursday, June 29, 1995

1. **MINUTES OF APRIL 24, 1995, MEETING (sent 5/2/95)**

2. **ADMINISTRATIVE MATTERS**

Election of Officers

Memorandum 95-27 (NS) (sent 5/2/95)

Report of Executive Secretary

3. **1995 LEGISLATIVE PROGRAM**

Memorandum 95-28 (NS) (sent 6/16/95)

4. UNFAIR COMPETITION (STUDY B-700)

Issues and Alternatives

Memorandum 95-32 (SU) (to be sent)

Constitutional Limits on Binding Absent Parties

Memorandum 95-35 (BG) (enclosed)

5. DEBTOR-CREDITOR RELATIONS

Homestead Exemption (Study D-352)

Memorandum 95-22 (SU) (enclosed)

Retirement Account Exemption (Study D-353)

Memorandum 95-31 (SU) (sent 6/16/95)

Friday, June 30, 1995

6. ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES (STUDY N-100)

Issues on SB 523 (Kopp)

Memorandum 95-29 (NS) (sent 6/16/95)

First Supplement to Memorandum 95-20 (to be sent)

7. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

Draft of Tentative Recommendation

Memorandum 95-30 (RM) (sent 6/16/95)

First Supplement to Memorandum 95-30 (to be sent)

8. ADMISSIBILITY OF ELECTRONIC DOCUMENTS (STUDY K-500)

Memorandum 95-34 (BG) (to be sent)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JUNE 29-30, 1995
SAN DIEGO

A meeting of the California Law Revision Commission was held in San Diego on June 29-30, 1995.

Commission:

Present: Colin Wied, Chairperson (June 30)
Allan L. Fink
Arthur K. Marshall
Sanford Skaggs

Absent: Bion M. Gregory, Legislative Counsel
Edwin K. Marzec, Vice Chairperson
Christine W.S. Byrd
Robert E. Cooper

Staff:

Present: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel

Absent: Robert J. Murphy, Staff Counsel

Consultants: Michael Asimow, Administrative Law (June 30)
Robert C. Fellmeth, Unfair Competition Litigation (June 29)

Other Persons:

Alexander Aikman, State Bar, Sacramento (June 30)
Clifford P. Dobrin, San Diego District Attorney's Office, San Diego (June 29)
James W. Han, State Bar, Business Law Section, Irvine (June 29)
Bill Heath, California School Employees' Association, San Jose (June 30)
Clark Kelso, Judicial Council, Sacramento (June 30)
David Long, State Bar, San Francisco (June 30)
Bernard McMonigle, Public Employment Relations Board, Sacramento (June 30)
Thomas A. Papageorge, Los Angeles District Attorney's Office, and California
District Attorneys Association Consumer Protection Committee, Los Angeles
(June 29)
Joel S. Primes, Attorney General's Office, Sacramento (June 30)
Madeline Rule, Department of Motor Vehicles, Sacramento (June 30)
Erik Saltmarsh, California Energy Commission, Sacramento (June 30)

Al Shelden, Consumer Law Section, Attorney General's Office, San Diego (June 29)
 Daniel Siegel, Attorney General's Office, Sacramento (June 30)
 Harry Snyder, Consumer's Union of U.S., Inc., San Francisco (June 29)
 Joyce A. Wharton, Office of Administrative Hearings, San Diego (June 30)

A quorum not being present at the meeting, all decisions made and actions taken at the meeting are subject to ratification by the Commission at the next meeting at which a quorum is present.

CONTENTS	
Minutes of April 24, 1995, meeting	3
Administrative Matters	3
Meeting Schedule	3
Legislative Membership of Commission	3
1995-96 Budget	3
Consultant Contracts	3
Commission Office Space	4
1995 Legislative Program	4
Status of 1995 Commission Legislative Program	4
Probate Tentative Recommendations	4
Study B-700 – Unfair Competition	5
Study D-352 – Homestead Exemption: Basic Issues	6
Study D-353 – Debtor-Creditor Relations: Retirement Account Exemption	7
Study N-100 — Administrative Adjudication by State Agencies	7
Public Utilities Act Exemption	7
State Board of Equalization Exemption Request	8
Hearsay Objections	8
Regulation Authority of Office of Administrative Hearings	8
Great Weight for Credibility Determinations of Presiding Officer	8
Study N-200 – Judicial Review of Agency Action	8
Exclusive Procedure for Judicial Review	8
Proper Court for Judicial Review	9
Standard of Review	9

MINUTES OF APRIL 24, 1995, MEETING

The Minutes of the April 24, 1995, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Meeting Schedule

The Executive Secretary should schedule a one-day meeting in August, after consulting with Commissioners on availability, if that would be helpful to the progress of current studies.

The Executive Secretary should also propose a schedule for future meetings based on more frequent one-day meetings, rather than less frequent two-day meetings.

Legislative Membership of Commission

The Executive Secretary reported that there have been no appointments of legislative members to the Commission. The appointment of an Assembly member is apparently in limbo as a result of the speakership impasse. The Executive Secretary has spoken with the Executive Officer of the Senate Rules Committee concerning appointment of a Senate member.

1995-96 Budget

The Executive Secretary reported that the Commission's budget for 1995-96 has been approved by the Senate and Assembly as proposed by the Governor, but the Legislature has not yet taken final action on the budget. The budget will be an austerity budget, but enough Commissioners have waived their compensation for the 1995-96 fiscal year that we can delay reducing Mr. Murphy's time base from 3/5 to 1/2 time at least until the end of 1995. At that time we will review our fiscal situation and see whether we can make it to the end of the fiscal year without the reduction in time base.

Consultant Contracts

The Executive Secretary reported that the Commission's contracts with Professors Eisenberg, Fellmeth, and Hone all expire on June 30, 1995. The Commission approved an extension of each of these contracts for one year, until June 30, 1996. The Executive Secretary should take whatever steps are necessary

to encumber funds from the 1994-95 fiscal year in the amount of \$1,000 to cover travel expenses under each of these contracts, to the extent funds are available.

Commission Office Space

The Executive Secretary reported that he is still keeping an eye out for subsidized office space for the Commission. There is a possibility of subsidized space in McGeorge Law School's emerging Institute for Legislative Practice, although the proximity to the Capitol and the possibility of loss of experienced staff as a result of relocation would be problems. The Commission noted that possible loss of experienced staff would be a significant deterrent to relocation of the Commission's office, notwithstanding potential savings on the cost of office space.

1995 LEGISLATIVE PROGRAM

Status of 1995 Commission Legislative Program

The Commission considered Memorandum 95-28 relating to the status of the Commission's 1995 legislative program. The Executive Secretary updated the memorandum with the chart attached as Exhibit p. 1.

The Executive Secretary noted that the annual resolution of the Commission's authority had been amended in the Senate Judiciary Committee to delete the reference to reporting on trial court unification under SCA 3 and replace it with a reference to reporting on statutory revision that may be necessitated by court unification or consolidation.

Probate Tentative Recommendations

The Commission has previously approved revisions of probate law to refine the rules on inheritance by half-blood relatives and to clarify the statute of limitations after a trust accounting. The Commission had decided to incorporate these revisions in pending legislation without circulating them for comment, but a vehicle for this purpose did not become available during the 1995 session. The Commission approved circulating the proposed revisions for comment as tentative recommendations, with the view to legislation for the 1996 legislative session.

STUDY B-700 – UNFAIR COMPETITION

The Commission considered Memorandum 95-32 concerning the issues and alternative approaches to revising the unfair competition statutes and Memorandum 95-35 concerning constitutional limits on binding absent parties. The Commission also received a letter and draft statute from Thomas A. Papageorge on behalf of the California District Attorneys Association Consumer Protection Committee and the Consumer Protection Division, Los Angeles County District Attorney's Office. (See Exhibit pp. 2-4.)

The Commission requested the staff to prepare a draft statute implementing the following ideas that emerged from the discussion and seemed to represent a consensus:

Notice of filing. A private plaintiff would be required to give notice to the Attorney General and perhaps to appropriate local prosecutors before or concurrent with filing of a claim under Business and Professions Code Section 17204 or 17535. Requiring 30 or 60 days' notice was discussed but rejected as unnecessary and burdensome on private plaintiffs.

Adequacy of representation and conflict of interest. Some type of determination should be made that the plaintiff's attorney is an adequate representative of the public interest, perhaps with some appropriate degree of rebuttable presumption in favor of public prosecutors, and that the plaintiff has no conflict of interest. This would leave open the possibility that a private plaintiff might be found to be a better representative of the interest of the general public in a particular case, but generally the public prosecutor would be the best plaintiff.

Disclosure of other pending unfair competition cases. The defendant should be required to disclose any other pending cases involving claims on behalf of the general public under Business and Professions Code Section 17204 or 17535 for the purpose of enabling the court to determine which plaintiff is best suited to move forward or to make other appropriate orders, such as for consolidation or abatement.

Notice of proposed settlement. At a minimum, notice of a proposed settlement should be given to the Attorney General and published in an appropriate registry. It was generally felt that this should be adequate notice to accomplish the purpose of giving truly interested persons sufficient notice of the opportunity to be heard on the settlement. Wider notice is not desirable because of the expense, and is unneeded as discussed below.

Court review and approval of settlements. The court would be required to review the proposed settlement of a claim representing the interest of the general public under Business and Professions Code Section 17204 or 17535. This approach puts the decision as to which plaintiff may proceed in the hands of the court, rather than in the hands of the defendant who likely has other interests in mind.

Binding effect of representative action. If the requirements of notice, adequacy, and court review have been followed, the settlement or a judgment as to the public interest would bar further claims on behalf of the general public. Individual claims for restitution for injury suffered by the individual would not be barred, but such later plaintiffs would not be able to make a claim on behalf of the general public. This feature is fundamental to the consensus scheme. It does not affect the due process rights of any person who has a personal claim for relief. An injured person is able to “opt out” of the settlement or judgment, in effect, by bringing an action on his or her own behalf. Thus, such person’s due process rights are not affected and the class action formalities are unnecessary. The approach is based on the conclusion that a person has no constitutional right to bring a representative action on behalf of the general public. It is this privilege under the unfair competition statute that is being restricted.

Attorney fees. It might be useful for the statute to make clear that private plaintiffs are not precluded from an award of attorney fees under Code of Civil Procedure Section 1021.5 in appropriate cases where a public prosecutor has taken over the action.

Location of statute. Opinion of commentators tended to favor locating the statute in the Code of Civil Procedure, rather than amending the unfair competition statutes.

STUDY D-352 – HOMESTEAD EXEMPTION: BASIC ISSUES

The Commission considered Memorandum 95-22 concerning the homestead exemption from enforcement of money judgments. The Commission approved the proposal to seek the repeal of the declared homestead statute and amend the automatic homestead exemption to continue the protection provided for voluntary sale proceeds available under the homestead declaration provisions. The rule requiring satisfaction of “all liens and encumbrances” in Code of Civil Procedure Section 704.800 should be revised to require a bid sufficient to satisfy

liens and encumbrances senior to the judgment creditor's lien. The staff will prepare a draft of a tentative recommendation for Commission consideration.

**STUDY D-353 – DEBTOR-CREDITOR RELATIONS:
RETIREMENT ACCOUNT EXEMPTION**

The Commission considered Memorandum 95-31 concerning the retirement account exemption from enforcement of money judgments. The Commission decided not to pursue this subject.

The table on page 5 of the memorandum should be corrected to read as follows:

Type	Before Payment	After Payment
Public retirement plans (§ 704.110): including pension or annuity, retirement, disability, death, or other benefit, under state, city, county, or other political subdivision, public trust, public corporation, public board (but not United States)	Totally exempt without making a claim	Totally exempt (including benefits and returns of contributions from United States); claimed exemption
Private retirement plans (§ 704.115(a)(1)-(2)): including , but not limited to union retirement plans, and profit-sharing plans designed and used for retirement purposes, annuity, pension, retirement allowance, disability payment, or death benefit (b)	Totally exempt claimed exemption	Totally exempt claimed exemption
Self-employed retirement plans and IRA's (§ 704.115(a)(3), (e))	Exempt to extent necessary to sup- port debtor upon retirement and spouse and de- pendents of debtor claimed exemption	Same standard; if paid periodically, exemption deter- mined under Wage Garnishment Law (about 1/4 subject to creditor claims) claimed exemption

STUDY N-100 — ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

The Commission considered Memorandum 95-29 and the First Supplement to Memorandum 95-29, relating to issues on SB 523 (Kopp). The Commission gave the staff the following guidance concerning outstanding issues on the bill:

Public Utilities Act Exemption

All Public Utilities Commission hearings that are conducted under the same procedures as the Public Utilities Act should receive the same exemption as Public Utilities Act hearings.

State Board of Equalization Exemption Request

The staff should resist the request of the State Board of Equalization to be totally exempt from SB 523, understanding that the ultimate decision on this matter rests with Senator Kopp.

Hearsay Objections

The Comment to Government Code Section 11513 should make clear that objections to hearsay need not be raised routinely in an administrative proceeding. A single objection based on the residuum rule either at the close of testimony or on a petition for reconsideration by the agency head is sufficient.

Regulation Authority of Office of Administrative Hearings

The authority of the Office of Administrative Hearings to adopt regulations in support of its functions should be stated in the statute governing the office.

Great Weight for Credibility Determinations of Presiding Officer

The Commission directed the staff to advise Senator Kopp that the “great weight” provision for credibility determinations of the presiding officer is an important element of the Commission’s recommendation, and that the provision should not be removed from the bill notwithstanding the Attorney General’s opposition to it.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission began consideration of Memorandum 95-30, the attached draft statute, and the First and Second Supplements. The Commission made the following decisions.

Exclusive Procedure for Judicial Review

The Commission approved making the new procedure the exclusive means of judicial review of agency action, replacing administrative and ordinary mandamus, certiorari, prohibition, and declaratory relief. The Commission noted the court can grant injunctive relief under the draft statute (Section 1123.660), and may stay agency action (Section 1123.650). There was some concern with the breadth of Section 1123.660 permitting the court to grant any appropriate relief. The Commission thought the draft statute should make clear it does not authorize courts to interfere with a valid exercise of agency discretion or to direct

an agency how to exercise its discretion. The Commission asked the staff to bring this back for further discussion.

The Commission approved the staff recommendation to add the following section to the draft statute:

§ 1121.110. Conflicting or inconsistent statute controls

1121.110. A statute applicable to a particular entity or a particular agency action prevails over a conflicting or inconsistent provision of this title.

Comment. Section 1121.110 is drawn from the first sentence of former Government Code Section 11523 (judicial review in accordance with provisions of Code of Civil Procedure “subject, however, to the statutes relating to the particular agency”).

Proper Court for Judicial Review

The Commission decided to preserve existing law on the proper court for judicial review of agency action. Thus jurisdiction would not be shifted from superior court to the Court of Appeal for judicial review of agency action that is now reviewed in superior court. Judicial review would remain in the Court of Appeal for the four agencies now reviewed in that court — Alcoholic Beverage Control Appeals Board, Agricultural Labor Relations Board, Workers’ Compensation Appeals Board, and Public Employment Relations Board. Jurisdiction would remain in the Supreme Court for the three agencies that now have direct review in that court — Public Utilities Commission (subject to possible enactment of SB 1322 which would shift judicial review of PUC cases to the Court of Appeal), State Bar Court, and Energy Commission (power plant siting decisions). Jurisdiction would remain both in the Supreme Court and Court of Appeal for the two agencies that have concurrent jurisdiction in those courts — Department of Alcoholic Beverage Control and Alcoholic Beverage Control Appeals Board. The draft statute would provide that judicial review is in superior court except as otherwise provided by statute.

For agencies that will retain Court of Appeal review, the staff should give further thought to how that court will take additional evidence when permitted to do so.

Standard of Review

The Commission wanted to preserve the existing standard of review in labor law cases without codifying a special standard for PERB and ALRB. The staff should do additional work on the Comment to Section 1123.420. For a good

discussion of the “clearly erroneous” standard in connection with a judicial reversal of the Labor Commissioner, the staff should look at *Hutchins v. Nieman Marcus*, 41 Cal. Rptr. 2d 46 (1995) (95 Daily Appellate Reports 5877, May 8, 1995).

The Commission approved the staff recommendation to add the following to the Comment to Section 1123.440:

Section 1123.440 applies, for example, to a local agency land use decision as to whether a planned project is consistent with the agency’s general plan. E.g., *Sequoyah Hills Homeowners Ass’n v. City of Oakland*, 23 Cal. App. 4th 704, 717-20, 29 Cal. Rptr. 2d 182, 189-91 (1993); *Dore v. County of Ventura*, 23 Cal. App. 4th 320, 328-29, 28 Cal. Rptr. 2d 299, 304 (1994). See also *Local and Regional Monitor v. City of Los Angeles*, 16 Cal. App. 4th 630, 638, 20 Cal. Rptr. 2d 228, 239 (1993); *No Oil, Inc. v. City of Los Angeles*, 196 Cal. App. 3d 223, 243, 242 Cal. Rptr. 37 (1987); *Greenebaum v. City of Los Angeles*, 153 Cal. App. 3d 391, 400-02, 200 Cal. Rptr. 237 (1984).

There was some sentiment for revising subdivision (c) of Section 1123.420 as follows:

(c) If a statute delegates to an agency interpretation of a statute or application of law to facts, the standard for judicial review of the agency’s determination is abuse of discretion. If an ordinance delegates to a local agency interpretation of its ordinance or application of an ordinance to facts, the standard for judicial review of the agency’s determination is abuse of discretion.

The staff should give further thought to this question.

The Public Employment Relations Board asked that its present authority under Government Code Section 3520 to treat questions of application of law to facts the same as questions of fact (substantial evidence) be preserved. Professor Asimow thought this could be dealt with by adding language to the Comment to say that, in application questions as in questions of law generally, where the facts are technical and complicated and agency expertise is necessary, deference should be given to PERB’s determination.

☐ APPROVED AS SUBMITTED

Date

☐ APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary